

# Property Transfers to Caregivers: A Comparative Analysis

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*ABSTRACT: Caregivers are key recipients of property transfers, both inter vivos and testamentary. The law's treatment of property transfers to caregivers changes according to the caregiver's relationship to the person cared for. Where caregivers are related to care recipients, the law generally favors the structuring of property transfers to caregivers as capital, rather than income transfers. While the law accepts that individuals are often not compensated for providing daily care for their relatives, many family caregivers receive bequests larger than their intestate shares of the care recipient's estate. On the other hand, when caregivers are not related to care recipients, the law approaches the care relationship using the terminology and frame of labor law. Bequests to non-family caregivers can raise a presumption of undue influence.*

*In this Article, we examine how the United States, Israel, and the United Kingdom approach property transfers to caregivers. The United States authorizes the payment of public benefits to family caregivers only in very restricted situations. The U.K. provides modest public benefits to many family caregivers. Israel incentivizes the employment of non-family caregivers but will pay family caregivers indirectly when assistance from non-relatives is unavailable. All three jurisdictions rely on family caregivers working for free or being compensated by the care recipients. We examine the advantages and disadvantages of several approaches to compensating family caregivers, including bequests from the care recipient, public benefits, tax incentives, private salaries paid by the care recipient, and claims against the recipient's estate. We conclude that while the provision of public benefits to family caregivers clearly needs to be increased, at least in the United States, a model funded exclusively by public money is probably impossible.*

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## I. INTRODUCTION

Every country with an aging population faces the challenge of caring for older people who require some assistance in performing the essential activities of daily living—such as eating, bathing, getting out of bed, and toileting. This assistance is usually seen as the point of entry into the spectrum of long-term care, a range of services that begins with informal caregiving and might progress to full-time residency in a caring facility. This Article focuses exclusively on the initial stage in the long-term care continuum and examines how caregivers are compensated for their efforts. In particular, this Article addresses the dichotomous treatment of family and non-family caregivers.

Family caregivers generally receive no explicit compensation as they provide care, even though this activity is typically a significant time commitment and often imposes health risks as well as major costs on family caregivers.<sup>1</sup> Non-family caregivers, in contrast, generally expect and receive explicit compensation as they provide the required services and stand as employees (either of the care recipient directly or through an independent agency that contracts to provide the required services).<sup>2</sup> This apparent discrepancy is somewhat ameliorated through testamentary transfers to family caregivers when the care recipient passes away.<sup>3</sup>

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1. See *infra* text accompanying notes 46–56.

2. See *infra* text accompanying notes 8–16.

3. See *infra* Part III.B.

In this Article, we examine approaches taken to property transfers to caregivers in U.S. federal law, several U.S. states, Israel, and the U.K. We review the advantages and disadvantages of the principal mechanisms for compensating family caregivers: testamentary bequests by care recipients, an explicit salary paid by care recipients, public benefits payable to the caregiver or the care recipient, and tax incentives. We also mention a potential further avenue for family caregivers to access compensation: filing claims against the care recipient's estate, using a variety of doctrinal bases. We show that the United States authorizes the payment of public benefits to family caregivers only in very restricted situations,<sup>4</sup> the U.K. provides modest public benefits to many family caregivers,<sup>5</sup> and Israel incentivizes the employment of non-family caregivers but will pay family caregivers indirectly when assistance from non-relatives is unavailable.<sup>6</sup> All the jurisdictions examined rely on family caregivers working for free or being compensated by the care recipients.<sup>7</sup>

Based on our comparative review, we conclude that while a publicly funded solution to family caregivers' plight may be impossible given today's increasing lifespans and limited public tolerance for taxes, benefits for family caregivers clearly need to be expanded, at least in the United States.

## II. COMPENSATING NON-FAMILY CAREGIVERS

Employment projections forecast that delivery of home health care and personal assistance services is likely to experience extended growth in the years ahead.<sup>8</sup> In the United States, for example, this sector of the economy has already seen the formation of national agencies like Home Instead,<sup>9</sup> Comfort Keepers,<sup>10</sup> and Visiting Angels.<sup>11</sup> These agencies maintain thousands of individual offices, operating as franchises with established prices for a wide-range of skilled and non-skilled services geared toward persons requiring assistance on a more or less chronic basis.<sup>12</sup> If anything, demand for such services is likely to expand as people live longer but have no family members

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4. See *infra* text accompanying notes 115–17.

5. See *infra* text accompanying notes 118–20.

6. See *infra* text accompanying notes 136–42.

7. See *infra* Part III.

8. See, e.g., Tomio Geron, *Elder Care Gets an Upgrade*, WALL ST. J. (Feb. 20, 2017, 10:47 PM), <https://www.wsj.com/articles/elder-care-gets-an-upgrade-1487646120> (reporting employment in home-based care for the elderly increased 83% in the past decade versus 6% overall).

9. HOME INSTEAD SENIOR CARE, <https://www.homeinstead.com> (last visited Mar. 13, 2018).

10. COMFORT KEEPERS, <http://www.comfortkeepers.com> (last visited Mar. 13, 2018).

11. VISITING ANGELS LIVING ASSISTANCE SERVS., <https://www.visitingangels.com> (last visited Mar. 13, 2018).

12. See, e.g., Ruth Simon, *Senior-Care Business Booms for Franchisers*, WALL ST. J. (Aug. 10, 2016, 10:03 PM), <https://www.wsj.com/articles/hot-franchising-trend-services-for-seniors-1470821404>.

to provide care<sup>13</sup>—either because they never had children or because their children live too far away or have other employment and family responsibilities that preclude their assuming the role of caregiver to their aging relatives.

The existing legal paradigm for non-family caregivers recognizes that this activity is simply a job despite the necessarily intimate aspects of personal assistance involved and the typical setting for such assistance—the personal residence of the care recipient.<sup>14</sup> Accordingly, formal employment contracts with stipulated payment rates and benefits are the norm, often between the caregiver and home health care agencies or other third-party intermediaries rather than with the care recipient directly.<sup>15</sup> Nonetheless, the caregiver/care recipient relationship is usually characterized as one between employer and employee.<sup>16</sup>

All three legal systems we reviewed recognize, however, that the work of many live-in caregivers is fundamentally different from jobs at conventional workplaces. Live-in caregivers spend most, if not all, of their time with the care recipient. While much of the time is spent monitoring that person rather than actually providing care, such care may become necessary at any hour of the day or night. Many live-in caregivers receive benefits beyond their wages, such as accommodation and meals.<sup>17</sup> Accordingly, U.S., U.K. and Israeli law all exempt the work of live-in caregivers from some generally applicable norms that otherwise govern employment relationships—such as the minimum wage, limitations on weekly hours, and overtime pay requirements.<sup>18</sup>

Israeli law further facilitates the compensation of non-family caregivers in two distinct ways. First, the long-term care benefits the Israeli National

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13. See Jennifer L. Wolff et al., *Supporting Family Caregivers of Older Americans*, 375 NEW ENG. J. MED. 2513, 2514 (2016).

14. See LAWRENCE A. FROLIK, RESIDENCE OPTIONS FOR OLDER AND DISABLED CLIENTS 286–87 (2008).

15. *Id.* at 292–94.

16. For an example of such a contract, see *id.* at 304–07.

17. See *Using Live in Caregivers as an Alternative to Assisted Living*, PAYING FOR SENIOR CARE, <https://www.payingforseniorcare.com/longtermcare/live-in-caregiver.html> (last visited Apr. 5, 2018).

18. See, e.g., 29 U.S.C. § 213(a)(15) (2012) (exempting “any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves” from the minimum wage requirement under § 206 and the maximum hours requirement under § 207); The National Minimum Wage Regulations 1999, SI 1999/584, art. 4, ¶¶ 36–37 (Eng.) (deducting from the minimum wage where the employee is provided with living accommodation); The Working Time Regulations 1998, SI 1998/1833, art. 3, ¶ 19 (Eng.) (exempting the employer of “a worker employed as a domestic servant in a private household” from requirements regarding the maximum length of the working week); FHH CJ 10007/09, *Gluten v. National Labor Court* 66(1) PD 518 (2013) (Isr.) (holding that care workers and their employers are not bound by the Work and Leisure Periods Act, 4711–1951, SH No. 76 (as amended) (Isr.), which regulates workday length and overtime pay).

Insurance Institute (“NII”) pays people who have reached retirement age,<sup>19</sup> live at home and need the assistance of another person in performing the routine tasks of daily living, or need supervision at home for their own safety,<sup>20</sup> can be used to pay a personal care giver, *so long as the caregiver is not a family member of the care recipient*—his or her spouse, brother, sister, son, daughter, brother-in-law, sister-in-law, son-in-law, or the parents, children or spouses of the above.<sup>21</sup> Second, Israeli courts have held that non-family caregivers are entitled to restitution of the value of their care from the recipient’s estate.<sup>22</sup>

While many non-family caregivers receive a salary for their efforts, at least some jurisdictions eye bequests care recipients make to such caregivers with suspicion. In the United States, most jurisdictions do not treat testamentary transfers to caregivers differently than other bequests,<sup>23</sup> but the few states that have special arrangements governing testamentary transfers to caregivers confine those provisions to non-family caregivers. For example, Illinois law includes a rebuttable presumption that testamentary transfers of more than \$20,000 to a “caregiver” are void,<sup>24</sup> but the definition of “caregiver” specifically excludes “a family member of the person receiving assistance.”<sup>25</sup> Nevada has a similar statutory presumption,<sup>26</sup> applicable to transfers of at least \$3,000,<sup>27</sup> and including a similar exemption for relative caregivers.<sup>28</sup>

19. Currently, retirement age is 67 for men and 62 for women. Retirement Age Act, 5764–2004, SH No. 1919 p. 46 (Isr.).

20. National Insurance Law [Consolidated Version], 5755–1995, SH No. 1522 p. 257 (Isr.). For a definition of “routine tasks,” see *id.* at 256–57.

21. The payment of long-term care benefits to recipients of family care is specifically prohibited in § 225A(a), which defines “care giver” as, *inter alia*, “not a relative of the person entitled to the long term care benefit.” National Insurance Law (Temporary Provisions), 5773–2013, SH No. 2407 p. 225 (Isr.). Other NII benefits payable to disabled persons, such as the Special Services Allowance, may of course also be used to pay caregivers, with no distinction being made between family and non-family caregivers. See National Insurance Law [Consolidated Version], 5755–1995, SH No. 1522 p. 254; National Insurance Regulations (Disability Insurance) (Supply of Special Services), 5738–1978, KT 3903 p. 83 (Isr.).

22. CC (TA) 1889/99 Maslewati v. Estate of Cohen (2001), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (restitution granted on top of a bequest of half of the care recipient’s estate); CC (Rehovot) 7200/98 Avnaim v. Estate of Allergand (2001), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (restitution granted out of an intestate estate; alternatively, the court justified its award as enforcing an oral agreement between the parties, accepting the caregivers’ contention that the care recipient undertook to pay them a salary for having cared for him). A similar oral agreement was recently enforced in Estate Case (TA) 8325-07-15 Rina v. Levi (April 9, 2017) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

23. See Robert Barton et al., *Acts of Gratitude or Disguised Malfeasance? New Statutes May Decide for Us*, PROB. & PROP. (May/June 2015) at 23 (noting legislative action “in several states”).

24. 755 ILL. COMP. STAT. § 5/4a-10(a) (2016).

25. *Id.* § 5/4a-5(1).

26. NEV. REV. STAT. ANN. § 155.097(2)(b) (2017).

27. *Id.* § 155.0975(6). On the other hand, Maine’s comparable statute does apply to relatives. ME. REV. STAT. ANN. tit. 33, § 1022(1), (2)(G) (2017).

28. NEV. REV. STAT. ANN. § 155.0975(2).

California presumes undue influence if a testamentary transfer is made to a “care custodian,”<sup>29</sup> but that phrase is defined to not include caregivers who provide services without remuneration if they have a personal relationship with the dependent adult receiving the services.<sup>30</sup> Moreover, the California statute provides a specific exception when the transferor and the transferee are related by blood.<sup>31</sup> In all other cases, the undue-influence presumption will apply unless the transfer is less than \$5,000<sup>32</sup> and the transferor’s estate is at least \$150,000.<sup>33</sup>

Similarly, the draft Israeli Civil Code provides that testamentary provisions for a person on whom the testator depended or with whom the testator had an especially trusting relationship are presumptively held to have been made under undue influence and are therefore void, except where the recipient is related to the testator or to his or her partner.<sup>34</sup>

### III. COMPENSATING FAMILY CAREGIVERS

The engagement of non-family caregivers is often preceded by some type of informal care provided by a care recipient’s family, generally on a *gratis* basis. Such family caregivers are a diverse lot and vary considerably in their ability to provide care, as many family caregivers have not undertaken any formal training for this activity.<sup>35</sup> In contrast to non-family caregivers, family caregivers usually do not look upon their efforts as a permanent situation and undertake the responsibility primarily as a stop-gap measure required by a sudden change in the care recipient’s circumstances.<sup>36</sup> In fact, a recent survey co-conducted by the Associated Press found that 77% of older Americans “would prefer to receive care in their own home”<sup>37</sup> and “7 out of 10 say they would prefer to receive care from family members, including spouses or partners, children, or other relatives.”<sup>38</sup> Accordingly, family caregivers try to forestall paid assistance or institutional care as long as possible, and half of such caregivers spend five or more years providing care, according to the

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29. CAL. PROB. CODE § 21380(a)(3) (2011).

30. *Id.* § 21362(a).

31. *Id.* § 21382(a).

32. *Id.* § 21382(e).

33. *Id.* § 13100.

34. Draft Bill for the Civil Law Codification, 5771–2011, HH (HaMemshala) No. 595 p. 699 (Isr.).

35. See MERRILL LYNCH, THE JOURNEY OF CAREGIVING: HONOR, RESPONSIBILITY AND FINANCIAL COMPLEXITY 15 (2017), [https://www.bofam.com/content/dam/boamlimages/documents/articles/ID17\\_1402/merr95416\\_caregiving\\_wp\\_m3b\\_10\\_26\\_17.pdf](https://www.bofam.com/content/dam/boamlimages/documents/articles/ID17_1402/merr95416_caregiving_wp_m3b_10_26_17.pdf).

36. *Id.* at 17.

37. ASSOCIATED PRESS-NORC CTR. FOR PUB. AFFAIRS RESEARCH, LONG-TERM CARE IN AMERICA: EXPECTATIONS AND PREFERENCES FOR CARE AND CAREGIVING 5 (2016), [http://www.longtermcarepoll.org/PDFs/LTC%202016/AP-NORC%20Long%20Term%20Care\\_2016.pdf](http://www.longtermcarepoll.org/PDFs/LTC%202016/AP-NORC%20Long%20Term%20Care_2016.pdf) [hereinafter AP SURVEY].

38. *Id.* at 6.

recent report of the National Academies of Science, Engineering and Medicine on family caregiving in the United States.<sup>39</sup>

The importance of informal caregiving is difficult to overstate. In the United States, approximately 80% of the long-term care received by older Americans is provided by informal caregivers, generally family members,<sup>40</sup> constituting an estimated value of \$470 billion in 2013.<sup>41</sup> Indeed, the other elements of the long-term care system—adult day care centers, assisted living facilities, nursing homes, and continuing care retirement communities—simply could not function if families of older relatives with physical or mental deficiencies did not provide this free care.

Informal caregiving is similarly dominant in the U.K. and Israel. The 2011 U.K. Census showed that out of a population of 63.2 million people, 6.5 million functioned as caregivers.<sup>42</sup> The U.K. government defines caregivers (referred to as “carers” in the U.K.) as persons who “spend[] a significant proportion of their life providing unpaid support to family or potentially friends.”<sup>43</sup> Carers UK, their representative organization, “estimates that 60 per cent of people will become a carer at some point in their lives.”<sup>44</sup> In similar manner, the Israeli Central Bureau of Statistics estimated in 2006 that 926,780 people, then amounting to 21.1% of the Israeli population aged 20 and higher, were providing care to one or more elders.<sup>45</sup>

#### A. COST OF CAREGIVING TO THE FAMILY CAREGIVER

Providing free care is not costless to the family caregiver. According to a recent survey by the National Alliance for Caregiving, almost 60% of family

39. RICHARD SCHULZ & JILL EDEN, NAT’L ACADS. SCIS., ENG’G, & MED., *FAMILIES CARING FOR AN AGING AMERICA* 2-7, 5-23 (2016), [http://www.johnahartford.org/images/uploads/reports/Family\\_Caregiving\\_Report\\_National\\_Academy\\_of\\_Medicine\\_IOM.pdf](http://www.johnahartford.org/images/uploads/reports/Family_Caregiving_Report_National_Academy_of_Medicine_IOM.pdf).

40. NAT’L ALL. FOR CAREGIVING, *CARING TODAY, PLANNING FOR TOMORROW* 3 (1999), <http://www.caregiving.org/data/archives/nacguide.pdf>.

41. SUSAN C. REINHARD ET AL., AARP PUB. POLICY INST., *VALUING THE INVALUABLE: 2015 UPDATE 1* (2015), <http://www.aarp.org/content/dam/aarp/ppi/2015/valuing-the-invaluable-2015-update-new.pdf>; see also Amalavoyal V. Chari et al., *The Opportunity Costs of Informal Elder-Care in the United States: New Estimates from the American Time Use Survey*, 50 *HEALTH SERVS. RES.* 871, 878 (2015) (estimating the opportunity cost of such services at \$522 billion per year).

42. LUKE CLEMENTS, *CARERS AND THEIR RIGHTS: THE LAW RELATING TO CARERS* 6 (6th ed. 2016); OFFICE FOR NAT’L STATISTICS (UK), 2011 CENSUS: POPULATION ESTIMATES FOR THE UNITED KINGDOM, MARCH 2011, at 2 (2012), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/2011censuspopulationestimatesfortheunitedkingdom/2012-12-17>.

43. HM GOV’T, *CARERS AT THE HEART OF 21ST-CENTURY FAMILIES AND COMMUNITIES: “A CARING SYSTEM ON YOUR SIDE. A LIFE OF YOUR OWN”* 19 (2008), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136492/carers\\_at\\_the\\_heart\\_of\\_21\\_century\\_families.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136492/carers_at_the_heart_of_21_century_families.pdf).

44. BRIAN SLOAN, *INFORMAL CARERS AND PRIVATE LAW* 3 (2013).

45. HALISHKA HAMERKAZIT LESTATISTIKA, HASEKER HACHEVRATI: *METAPLIM LELO TMURA KASBIT* [CENTR. BUREAU OF STATISTICS, SPECIAL SURVEY ON INFORMAL CARE] (2006) (Isr.), [http://www.cbs.gov.il/reader/?Mival=cw\\_usr\\_view\\_SHTML&ID=925](http://www.cbs.gov.il/reader/?Mival=cw_usr_view_SHTML&ID=925).

caregivers in the United States also work in other vocations but must often restrict their job-related travel, reduce their employment hours, or decline promotions to accommodate their caregiving responsibilities.<sup>46</sup> The previously referenced Associated Press survey found that “[44%] of caregivers under the age of 65 report[ed] missing work” because of their caregiving responsibilities.<sup>47</sup> In many cases, a family caregiver takes early retirement or otherwise terminates his or her outside employment because of caregiving obligations—a decision with significant immediate and long-term financial consequences for these caregivers.

Caregivers who leave the compensated workforce obviously earn less money and forfeit possible raises.<sup>48</sup> In the United States, family caregivers also lose the ability to earn “quarters of coverage” under Social Security<sup>49</sup> and to be credited with additional earnings under that program.<sup>50</sup> As a consequence, they either will not qualify for retirement benefits if they fail to accumulate “40 quarters of coverage,”<sup>51</sup> or will receive a lower monthly benefit due to their diminished earnings during the 35-year work period that determines their benefit amount.<sup>52</sup> Furthermore, failing to accumulate “40 quarters of coverage”<sup>53</sup> may also mean no automatic entitlement to Medicare’s coverage of future health care expenses at retirement.<sup>54</sup> In addition, a family caregiver cannot contribute to an employer-sponsored retirement program like a 401(k) plan, an Individual Retirement Account, or other self-directed retirement program, because these plans require the receipt of earned income.<sup>55</sup>

The burden on family caregivers, moreover, is not just financial. Caregivers also suffer from significant health burdens, “consistently . . .

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46. See AARP PUB. POLICY INST. & NAT’L ALL. FOR CAREGIVING, CAREGIVERS OF OLDER ADULTS: A FOCUSED LOOK AT THOSE CARING FOR SOMEONE AGE 50+, at 3, 40 (2015), <http://www.aarp.org/content/dam/aarp/ppi/2015/caregivers-of-older-adults-focused-look.pdf>.

47. AP SURVEY, *supra* note 37, at 7.

48. See METLIFE MATURE MKT. INST., THE METLIFE STUDY OF CAREGIVING COSTS TO WORKING CAREGIVERS: DOUBLE JEOPARDY FOR BABY BOOMERS CARING FOR THEIR PARENTS 14 (2011), <http://www.caregiving.org/wp-content/uploads/2011/06/mmi-caregiving-costs-working-caregivers.pdf> (reporting lost wages for female caregivers of almost \$143,000).

49. 42 U.S.C. § 413(a)(2)(A) (2012) (defining quarters of coverage).

50. See LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 293–98 (6th ed. 2014) (explaining how reported earnings determine a person’s Social Security retirement benefit).

51. 42 U.S.C. § 414(a)(2).

52. *Id.* § 415(b)(2)(A)(i), (B)(iii).

53. *Id.* § 414(a)(2).

54. See *id.* §§ 426(a)(2)(A), 1395(c).

55. See I.R.C. § 219(b)(1)(B) (2012) (describing individual retirement accounts); *id.* § 408(k)(2)(C) (describing simplified employee pensions); *id.* § 408(p)(2)(A)(ii)–(iii) (describing simple retirement accounts); *id.* § 408A(c)(2)(A) (describing Roth IRAs).



report[ing] worse [General Health Questionnaire] scores than non-caregivers.”<sup>56</sup>

The impact and costs of family caregiving are as grievous, if not worse, in the U.K. In terms of health, Carers UK claims that “[o]ver half of all carers have a caring-related health condition.”<sup>57</sup> A survey of 5,000 caregivers found that caregivers “are twice as likely to be in bad health as non-carers.”<sup>58</sup> Similarly, a 2014 survey “found that carers across all age groups are more likely [than non-caregivers] to say they suffer from anxiety or depression”<sup>59</sup> and “84% of care[givers] reported that caring had had a negative impact on their health [while] separate research . . . found a 23% increased risk of stroke for spousal carers.”<sup>60</sup>

As for U.K. caregivers’ economic difficulties, one report claims “that UK carers lose an average of £11,000 per year due to their caring responsibilities.”<sup>61</sup> Furthermore, “54% of carers are struggling to pay household bills,” nearly half of working caregivers “had reduced their hours and nearly a third (32%) had refused a promotion or taken a less qualified job in order to manage their workload and caring responsibilities.”<sup>62</sup> As a result, in 2014, “44% of carers were in debt because of their caring roles (a figure that rose to 69% when the family had no savings when they started to care)”<sup>63</sup> and “31% went without food.”<sup>64</sup> A joint report by Employers for Carers, the U.K. Department of Health, and Carers UK found that 2.3 million people had quit work to care and almost 3 million have reduced their working hours.<sup>65</sup> A survey of 4,500 caregivers found that “[o]f those who gave up work, retired early or reduced working hours, 65% said . . . the stress of juggling work and care was a contributing factor, 30% cited the lack of suitable care services and 22% cited the expense of care services.”<sup>66</sup>

56. Emmanouil Mentzakis et al., *Who Cares and How Much: Exploring the Determinants of Co-Residential Informal Care*, 7 REV. ECON. HOUSEHOLD 283, 300 (2009).

57. CLEMENTS, *supra* note 42, at 28 (citing NAT’L HEALTH SERV. INFO. CTR., SURVEY OF CARERS IN HOUSEHOLDS 2009/10, 53, 56 (2010) (“Overall, just over a half (52%) said that their health had been affected in some way.”)).

58. *Id.* at 28 n.76.

59. *Id.*

60. *Id.* at 28–29 (citing NAT’L HEALTH SERV., COMMISSIONING FOR CARERS: PRINCIPLES AND RESOURCES TO SUPPORT EFFECTIVE COMMISSIONING FOR ADULT AND YOUNG CARERS (2014)), <https://www.england.nhs.uk/commissioning/wp-content/uploads/sites/12/2014/12/commissioning-for-carers-principles-091214.pdf>.

61. SLOAN, *supra* note 44, at 16 (footnote omitted).

62. CLEMENTS, *supra* note 42, at 29–30.

63. *Id.* at 29 (citing CARERS UK, CARING & FAMILY FINANCES INQUIRY (2014)).

64. *Id.* at 30 (citing CONTACT A FAMILY, COUNTING THE COSTS 2014 (2014)), [https://www.cafamily.org.uk/media/805120/counting\\_the\\_costs\\_2014\\_uk\\_report.pdf](https://www.cafamily.org.uk/media/805120/counting_the_costs_2014_uk_report.pdf).

65. *Id.* at 30 (citing CARERS IN EMP’T TASK & FINISH GRP., HM GOV’T, SUPPORTING WORKING CARERS: THE BENEFITS TO FAMILIES, BUSINESS AND THE ECONOMY 8, 15 (2013)).

66. *Id.* at 30–31 (citing CARERS IN EMP’T TASK & FINISH GRP., HM GOV’T, SUPPORTING WORKING CARERS: THE BENEFITS TO FAMILIES, BUSINESS AND THE ECONOMY (2013)).

Similarly, Israeli researchers report that of caregivers under retirement age, more than a third of caregivers providing at-home hospice care and about a tenth of caregivers for dementia patients and of caregivers for long-term care benefits recipients terminated their employment in order to care full time.<sup>67</sup> Half of caregivers providing hospice care at home, about a third of caregivers for long-term care benefits recipients and about a fifth of caregivers for dementia patients had to take days off work to provide care.<sup>68</sup> Between a quarter and a third of caregivers report having had to abbreviate workdays.<sup>69</sup> Half of caregivers providing hospice care at home and a fifth of caregivers for dementia patients reported that another family member took days off work or had to abbreviate workdays in order to provide care as a secondary caregiver.<sup>70</sup> Ninety-six percent of caregivers providing hospice care at home reported that they or other family members bore some of the cost burden of care.<sup>71</sup> Seventy-five percent of caregivers for dementia patients, 72% of caregivers providing hospice care at home and 59% of caregivers for patients eligible for long-term care benefits, other than the patients' partners, reported bearing some of the costs of care.<sup>72</sup> For ease of comprehension, these data are presented again in Table 1.<sup>73</sup>

Table 1. Israeli Caregivers Who Suffered Economic Harm as a Result of Providing Care

	Of Caregivers Providing Home Hospice Care	Of Caregivers For Dementia Patients	Of Caregivers for Long-Term Care Benefits Recipients
Terminated their Employment to Care Full Time	33%	10%	10%
Took Days Off Work to Provide Care	50%	20%	33%
Other Family Members Took Days Off Work or Abbreviated Working Hours to Provide Care	50%	20%	n/a
Bore Some of Cost Burden of Care	72%	75%	59% (of non-partner caregivers)

67. JENNY BRODSKY ET AL., BCHINAT SUGIYOT BETIPOLAM SHEL BNEY MISHPACHA BEZKENIM: MEAFYENEY HATIPOL, OMES VETOCHNIYOT LESIYOA VETMICHA [TOPICS IN FAMILY CARE FOR THE ELDERLY: CARE CHARACTERISTICS, WORKLOAD, AND ASSISTANCE AND SUPPORT PLANS] 35-36 (2011) (in Hebrew).

68. *Id.* at 35.

69. *Id.*

70. *Id.* at 35-36.

71. *Id.* at 36.

72. *Id.* at 36.

73. For tbl.1 data see *id.*

Similarly, a national survey of Israeli women caring for a sick or disabled relative found that 60% of such women bear some of the cost of care.<sup>74</sup> In 2002, providing care in Israel to an Alzheimer's disease patient was found to cost the informal caregiver \$3,700 annually in direct costs—\$3,372 of which were spent on purchasing care. Replacing the informal care with purchased care would have cost an additional \$10,520 annually.<sup>75</sup> Between a third and two-thirds of caregivers reported a heavy to very heavy workload resulting from providing care.<sup>76</sup> The long-term financial consequences are also significant for Israeli caregivers. While the meager old age pensions paid by the Israeli National Insurance Institute are not conditioned on a prior history of employment,<sup>77</sup> a period of non-, or reduced, employment due to caregiving will have an adverse effect on the caregiver's payments into, and therefore his or her entitlement under, their defined contribution pension plan.<sup>78</sup>

### B. TESTAMENTARY PROVISION FOR FAMILY CAREGIVERS

Private efforts to ameliorate the financial costs that family caregivers bear usually take the form of preferential testamentary provisions,<sup>79</sup> typically an additional allotment of the residuary estate, and most often ownership of the care recipient's home. This practice goes beyond the law of intestate succession, which generally prefers family members as recipients of a decedent's property in the absence of a probated will but does not provide any special allowance for those family members who provided care to the decedent. The not-uncommon bargain of "take care of me and you can have my house" has several deficiencies, especially when compared to the treatment of non-family caregivers.

#### 1. Possible Challenges by Other Family Members

Without a doubt, the single most significant drawback to relying on a testamentary supplement is the possibility that other family members may

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74. *Id.*

75. *Id.* at 36–37.

76. *Id.* at 37.

77. National Insurance Law [Consolidated Version], 5755–1995 p. 262–63 (Isr.) (detailing the qualifications for Israeli old age benefits).

78. Since 2007, such plans have been compulsory for all employment relationships under Israeli law. See Compulsory Retirement Insurance Extension Order [Consolidated Version], 5771–2011, YP 6938 p. 6938 (Isr.), issued under the Collective Labor Agreements Act, 5717–1957, SH No. 221 p. 63 (as amended) (Isr.) (updating the compulsory retirement saving regime, applicable across the Israeli economy, which was first established in 2007).

79. See Meta Brown, *Informal Care and the Division of End-of-Life Transfers*, 41 J. HUM. RESOURCES 191, 217 (2006). For empirical results supporting this claim, see Edward C. Norton et al., *Informal Care and Inter-vivos Transfers: Results from the National Longitudinal Survey of Mature Women*, 14 B.E.J. ECON. ANALYSIS & POL'Y 377, 379 (2014) (finding "that a child who provides informal care is more likely to receive inter-vivos transfers than a sibling who does not").

challenge the applicable provision on grounds of undue influence or testator incapacity, *inter alia*. Family caregivers necessarily operate in very intimate surroundings with barely any supervision or external verification short of installed cameras in the care recipient's home. Such circumstances would seem tailor-made for challenging the bona fides of the supplemental testamentary provision to the family caregiver, especially if other family members were available and willing to shoulder some of the caregiving responsibility for the now-deceased relative.

To discuss the most widely applicable of the U.K.'s several constituent legal systems, English law distinguishes between actual and presumed undue influence. English courts have sometimes found actual undue influence in cases of gifts to caregivers. For example:

[I]n *Langton v Langton*, actual undue influence was made out via the carers' repeated suggestions that the care recipient transfer his property to them, coupled with the care recipient's fear that they would stop looking after him if he did not execute the gift . . . .

. . . .

Presumed undue influence is made out if there is a relationship of influence combined with a transaction calling for explanation, and the defendant fails to provide sufficient evidence that the transaction in question was the product of the complainant's free will.<sup>80</sup>

This doctrine poses significant risks to caregivers because if such a relationship of influence is said to exist wherever a transferor was vulnerable, then gifts to caregivers will nearly always be at a significant risk of being set aside. Justice Lindsay of the English High Court recently commented that it is "at least arguable" that a presumption of influence could arise where "the alleged victim is an elderly parent [who] is living alone and is no longer in good health [and] that the child alleged to have influence is the one who, in large part, is responsible for his care."<sup>81</sup> Brian Sloan, a leading English scholar of care law, believes that "it seems likely that a situation involving a significant amount of care will lead to a relationship of influence."<sup>82</sup>

Where a presumption of undue influence arises, it can be rebutted by showing that the claimant had access to independent professional advice, which must be shown to have had an "emancipating effect."<sup>83</sup> The advice is

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80. SLOAN, *supra* note 44, at 223, 225 (citing *Langton v. Langton* [1995] 2 F.L.R. 890 n.29).

81. *Hogg v. Hogg* [2007] EWHC 2240 (Ch) [43] (Eng.).

82. SLOAN, *supra* note 44, at 229.

83. *Royal Bank of Scotland v. Etridge* [2001] UKHL 44, [2002] 2 AC 773 [20] (appeal taken from Eng.).

unlikely to be independent if given in the donee's presence and must be "removed entirely from the suspected atmosphere."<sup>84</sup> Sloan notes:

[T]he carer is placed in a difficult position since he is likely to be in a position to arrange for the advice and yet he must take great care not to be connected with its delivery. Moreover, it could be difficult to ensure that the advice is given in an emancipating environment given that a care recipient is by definition unable to attend comprehensively to her own needs and may have difficulty in leaving her home.<sup>85</sup>

Similarly, Israeli law provides that a testamentary provision made under duress, a threat, undue influence, trickery or deceit is void.<sup>86</sup> However, where a year has elapsed since the duress, threat, influence or trick had ceased to affect the testator, and despite being able to avoid the will he or she has not done so, the flaw in the testator's intentions will no longer result in the will being held void.<sup>87</sup> Israeli courts have held that where circumstances show a comprehensive and fundamental dependence of the testator on a testamentary beneficiary, testamentary provisions that clearly benefit that beneficiary raise a rebuttable presumption of undue influence.<sup>88</sup>

Related questions pertain to proving that the caregiving services were actually provided and what they were worth. Such issues are especially difficult to resolve years or decades after the services were provided, which is when will challenges often take place. For example, in a U.S. case dealing with the taxability of a personal residence transferred in exchange for caregiving services provided by a family member, the probate judge acknowledged that the family caregiver "had a substantial claim against [the homeowner] for services rendered in taking care of [that person] during [a six year period]. *This claim is . . . satisfied* by conveying the former . . . homestead."<sup>89</sup> The caregiver had raised the issue of whether the value of the home being transferred exceeded the value of her caregiving services and therefore overstated the amount of her taxable compensation.<sup>90</sup> The caregiver, in effect, wanted the court to bifurcate the transfer of the home into two

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84. *Coomber v. Coomber* [1911] (1) Ch 723 at 730 (Eng.).

85. SLOAN, *supra* note 44, at 238.

86. Inheritance Act, 5725-1965, SH No. 446 p. 63 (Isr.).

87. *Id.* at 67.

88. CA 423/75 Bin-Nun v. Richter 31(1) PD 372 (1975) (Isr.); *see also* Further Hearing of CA 1516/95 Marom v. The Att'y-Gen. 52(2) PD 813 (1998) (Isr.); CA 2500/93 Steiner v. The Mutual Assistance Project of the Central European Immigrants' Organization 50(3) PD 338 (1996) (Isr.). For more information on the Israeli law of undue influence in the testamentary context, see Ronen Kritenstein, *On Influence and Families - the Doctrine of Undue Influence in Inheritance Law*, in *FESTSCHRIFT FOR ELIYAHU MATZA* 935 (Aharon Barak et al. eds., 2015) (in Hebrew).

89. *United States v. Dieter*, No. Civ. 01-1435 (DWF/AJB), 2003 WL 1903395, at \*4 (D. Minn. Apr. 11, 2003) (emphasis added).

90. *Id.* at \*9.

components—compensation for the caregiving services, which would be taxable, and a gift, which would be tax-free.<sup>91</sup> The court dismissed this contention on the grounds that it was raised too late in the proceedings.<sup>92</sup> Too often, such testamentary supplements are treated as all-or-nothing in terms of compensatory elements, and there is no way to determine whether the property at issue exceeds the value of the caregiving services that were provided.

Even if a challenge by a family member does not arise, the inescapable result of a testamentary allowance for family caregiving is that the funds are not received as the caregiving services are being provided, and the deferral period may be many years or even decades. As a result, present-value considerations suggest that the tradeoff may have negative implications for the family caregiver, quite apart from any potential lost investment earnings on the foregone income during the deferral period.

## 2. Impact on Retirement Benefits

At the same time, post-mortem compensation has one distinct advantage: U.S. wealth transfers to family caregivers that take the form of bequests are free of income tax to the recipients.<sup>93</sup> In effect, caregiver recipients of bequests have substituted a tax-free inheritance for what would otherwise have been taxable wages. While the United States and U.K. levy estate taxes (called an inheritance tax in the U.K.), they are paid by the executor rather than the legatees<sup>94</sup> and so are of no concern to the latter, unless the tax paid shrinks the estate so that the legacies bequeathed abate. Moreover, the U.S. estate tax applies to very few estates given the generous exemption provided (\$5.6 million in 2018).<sup>95</sup> The U.K. provides a £425,000 exemption from inheritance tax.<sup>96</sup> Israel abolished its estate tax in 1981.<sup>97</sup>

Nevertheless, for Americans, the absence of reportable income resulting from compensation for care being received in bequest form often translates into fewer Social Security credits and lower Social Security earnings.<sup>98</sup> As

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91. I.R.C. § 102(a) (2012).

92. *Dieter*, 2003 WL 1903395, at \*10.

93. I.R.C. § 102(a).

94. I.R.C. § 641; Inheritance Tax Act 1984, c. 51, sch. 226(2) (UK).

95. I.R.C. § 2010(c)(3); Rev. Proc. 2017-58, 2017-45 I.R.B. 489, 495.

96. The basic “nil-rate-band” is worth £325,000. Inheritance Tax Act 1984, c. 51, sch. 1 (UK), *amended by* Finance Act 1986, sch. 19, para. 2. An additional, so-called main “residence nil-rate-band” is available since April 7, 2017 to the estates of homeowners whose direct descendants inherit the decedent’s residence. *Id.* This additional nil-rate-band is worth £100,000 in 2017–2018 and will increase by £25,000 each year until reaching £175,000 in 2020–2021. *Id.* § 8D(5)(a). It will then be indexed to the consumer prices index. *Id.* § 8D. The main residence nil-rate-band is reduced by £1 for every £2 of estate value above £2 million. *Id.* § 8D(5).

97. Estate Duty Act (Abolition), 5741–1981, SH No. 1015 p. 160 (as amended) (Isr.).

98. See FROLIK & KAPLAN, *supra* note 50, at 283–84, 297.

noted earlier,<sup>99</sup> this situation can result in lower or no Social Security retirement benefits, no premium-free Medicare Part A benefits for hospital, some nursing home, home health care, and hospice services,<sup>100</sup> and an inability to fund self-directed retirement savings plans.<sup>101</sup> Similarly, British scholars Evandrou and Glaser found that occupational pension scheme membership was rarer among U.K. men and women who stopped work as a result of caring than among other U.K. persons.<sup>102</sup> They also found that members of the former group who were scheme members had accumulated fewer years of contributions than their counterparts who continued working, with direct implications for their level of pension income in later life.<sup>103</sup>

To be sure, U.S. family caregivers might be able to obtain Social Security and Medicare benefits by being the spouse<sup>104</sup> (or a divorced spouse, if their marriage lasted at least ten years)<sup>105</sup> of a qualifying beneficiary of those essential programs, but many family caregivers lack such status. Likewise, Medicare Part A benefits can be purchased by a citizen or resident who has resided in the United States at least five years,<sup>106</sup> but the cost is adjusted every year for inflation and was \$422 per month in 2018.<sup>107</sup> In similar fashion, while an inability to fund tax-preferred retirement savings plans does not preclude a family caregiver from saving funds for her retirement outside of such plans, doing so forgoes potentially significant tax advantages and requires more determined financial self-discipline than many people can muster on a consistent basis.

Overall, many caregivers might prefer a tax-free inheritance to taxable wages, but that trade-off may ultimately be short-sighted and compromise their future financial security.

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99. See *supra* text accompanying notes 49–54.

100. See FROLIK & KAPLAN, *supra* note 50, at 66–77.

101. See *supra* note 55.

102. See Maria Evandrou & Karen Glaser, *Combining Work and Family Life: The Pension Penalty of Caring*, 23 AGEING & SOC'Y 583, 596 (2003) (discussing the results of the British Family and Working Lives Survey of 1994–1995).

103. *Id.* For the opportunity costs borne by British caregivers, see also generally Axel Heitmueller & Kirsty Inglis, *The Earnings of Informal Carers: Wage Differentials and Opportunity Costs*, 26 J. HEALTH ECON. 821 (2007) (analyzing results of the British Household Panel Study). For similar results among caregivers aged fifty or higher across Europe, see K. Bolin et al., *Your Next of Kin or Your Own Career? Caring and Working Among the 50+ of Europe*, 27 J. HEALTH ECON. 718, 735–37 (2008). For a study finding women's employment to be negatively associated with informal caregiving to the elderly across the European Union, see Andreas Kotsadam, *Does Informal Eldercare Impede Women's Employment? The Case of European Welfare States*, 17 FEMINIST ECON. 121, 139–40 (2011).

104. 42 U.S.C. § 402(b)–(c) (2012).

105. *Id.* § 416(d)(1), (4).

106. *Id.* § 1395i-2(a)(3).

107. *Medicare 2018 Costs at a Glance*, MEDICARE.GOV, <https://www.medicare.gov/your-medicare-costs/costs-at-a-glance/costs-at-a-glance.html> (last visited Mar. 16, 2018).

## IV. ALTERNATIVE APPROACHES TO COMPENSATING FAMILY CAREGIVERS

Caring for an older person with certain physical and/or cognitive impairments is serious work and should be considered as such, regardless of whether the caregiver is related to the care recipient. Non-family caregivers have typically planned to devote their working hours to this endeavor in exchange for monetary compensation provided on a roughly contemporaneous basis with the provision of care. In contrast, family caregivers are often conscripted into providing such services with little or no warning, on an indeterminate schedule, without compensation and generally without any endpoint known in advance to their responsibilities. While family caregivers' service may originate from a sense of familial responsibility or even biblical obligation,<sup>108</sup> the physical burdens and risk of physical injuries that family caregivers assume parallel those of non-family caregivers and are often compounded by the emotional stress that stems from the underlying family relationship.<sup>109</sup>

The substantial hours many family members devote to caregiving effectively substitute for more traditional employment and often require the family caregiver to give up her prior involvement in the formal workplace.<sup>110</sup> The senior author of this Article has a peculiar habit when attending retirement parties of friends and associates to inquire what the newly retired person plans to do upon leaving full-time employment. Quite often, the answer is to take care of that person's aging parent or other relative. In effect, the soon-to-be-retired person is not in fact "retiring," but simply switching jobs and undertaking substantial work activity in a non-compensatory role.<sup>111</sup> The point remains that family caregiving is real work and should be treated as such. Family caregivers should not have to depend on the vagaries and uncertainties of a deferred testamentary provision that may not transpire for many years and may ultimately be nullified if challenged by disapproving siblings and other relatives.

A better approach would provide regular compensation in an amount comparable to what non-family caregivers receive. The amount of

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108. See Richard L. Kaplan, *Honoring Our Parents: Applying the Biblical Imperative in the Context of Long-Term Care*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 493, 494 (2007).

109. See NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 39, at 3-2; see also GENWORTH, THE EXPANDING CIRCLE OF CARE: BEYOND DOLLARS 2015, at 5 (2016), <https://pro.genworth.com/riiproweb/productinfo/pdf/157453C.pdf> (finding that "33% of caregivers reported an extremely high level of stress"); Richard Schulz & Scott R. Beach, *Caregiving as a Risk Factor for Mortality: The Caregiver Health Effects Study*, 282 JAMA 2215, 2218-19 (1999) (finding that "caregivers who provide support to their spouse and report caregiving strain are 63% more likely to die within 4 years than noncaregivers").

110. See SCHULZ & EDEN, *supra* note 39, at 4-4 to -6.

111. See also Paula Span, *Caregivers Sometimes Must Sacrifice Their Careers*, N.Y. TIMES (Dec. 4, 2015), <https://www.nytimes.com/2015/12/08/health/elder-caregivers-often-sacrifice-their-careers.html> (discussing the difficulty caregivers have balancing their careers with their caregiving roles).



compensation could take into account the technical level of services provided, the corresponding need for professional training to deliver those services, geographic variances, and the possibility that family caregivers may be more reliable than non-family caregivers in terms of showing up for work every day.<sup>112</sup> After all, it may be a job for family caregivers, but it is not *just* a job when the care they provide is for close relatives.

Once family caregiver compensation is established, the next question is who should pay for it? That is, should families—and more specifically, the care recipient—be solely responsible for compensating family caregivers, as is the case presently with a system that relies on testamentary compensation, or should this responsibility be shared more broadly, as is the case with certain other elements of the long-term care continuum, particularly nursing homes? While that inquiry, as a normative matter, is beyond the scope of this Article, we turn now to three general mechanisms for providing compensation to family caregivers. We begin with a public financing model, then a mixed public-private model using tax incentives, and finally, a private model of formal family caregiver agreements. A brief fourth subsection reviews additional potential mechanisms.

#### A. FIRST MECHANISM: PUBLIC FINANCING

Like their non-family counterparts, family caregivers provide an important service that enables the care recipient to stay in his or her home and avoid institutional arrangements that often entail some degree of public financing (if not complete subsidization). U.K. research found “that funding carer support services is a cost effective preventative investment—that for every £1.00 invested in carers, there is a potential equivalent reduction in local authority cost of £5.90 and with significantly greater ‘social return’ benefits.”<sup>113</sup> Similarly, accountancy network Baker Tilly “found that a £5 million investment in carer support services produced approximately £73 million of value to society.”<sup>114</sup> It is therefore appropriate for there to be some public financing to compensate family caregivers, because their work may actually reduce public expenditures that would otherwise be required in more expensive care settings. For that reason, U.S. legislation enacted in 2010 authorizes a monthly “stipend” to family caregivers of certain U.S. military veterans,<sup>115</sup> but there is no such federal program for older U.S. persons

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112. Cf. 38 U.S.C. § 1720G(a)(3)(C)(ii) (2012) (requiring that stipends paid to family caregivers of U.S. veterans be “not less than the monthly amount a commercial home health care entity would pay an individual in the geographic area of the eligible veteran to provide equivalent personal care services”).

113. CLEMENTS, *supra* note 42, at 37 (footnote omitted) (citing DEP’T OF HEALTH ET AL., ECONOMIC CASE FOR LOCAL INVESTMENT IN CARER SUPPORT (2015)).

114. *Id.* at 37 n.104 (citing BAKER TILLY, THE PRINCESS ROYAL TRUST FOR CARERS 2 (2011)).

115. See Caregivers and Veterans Omnibus Health Services Act of 2010, Pub. L. No. 111-163, § 101(a)(1), 124 Stat. 1130, 1132 (enacting 38 U.S.C. § 1720G(a)(3)(A)(ii)(V), (C) (2012)).

generally.<sup>116</sup> Some states pay a small grant to family caregivers residing with an adult dependent.<sup>117</sup>

The U.K., on the other hand, has a long history of providing family caregivers with a modest benefit program and more extensive alternative support programs. Persons 16 years of age or over who are present and resident in the U.K., not in full-time education, who provide at least 35 hours of care a week to a person entitled to one of several qualifying disability benefits and do not earn over £116 a week (after certain deductions) are entitled to a Carers' Allowance of £62.70 a week.<sup>118</sup> The Carers' Allowance is taxable income, but on its own it is beneath the tax-filing and owing threshold.<sup>119</sup> Caregivers in receipt of other benefits are entitled not to the Carers' Allowance, but, depending on the benefit they receive, to additions to that benefit, namely either a "carer premium," a "carer addition," or a "carer element," all worth approximately £35 a week.<sup>120</sup>

In the U.K. system, local authorities are charged with assessing caregivers' support needs,<sup>121</sup> a caregiver being defined as "an adult who provides or intends to provide care," including "practical or emotional support," to another adult.<sup>122</sup> A local authority will determine a caregiver to be eligible for support when, "as a consequence of providing necessary care to an adult,"<sup>123</sup> the following circumstances exist:

- (a) the carer's physical or mental health is, or is at risk of, deteriorating;
- (b) the carer is unable to achieve any of the following outcomes—
  - (i) carrying out any caring responsibilities the carer has for a child;

116. See S. 786, 114th Cong. §§ 5, 7 (2015). Paid family leave for caregivers who were recently employed was proposed in 2015 to be financed by a 0.2% increase in the Social Security payroll tax, but no action was taken on that proposal. See *id.* § 7.

117. See, e.g., MD. CODE ANN., HUM. SERVS. § 10-704 (West 2007); VA. CODE ANN. § 63.2-2201 (West 2011).

118. *What Is Carer's Allowance?*, CARERS UK, <https://www.carersuk.org/help-and-advice/financial-support/help-with-benefits/carers-allowance> (last visited Mar. 22, 2018). Other countries pay higher value benefits directly to caregivers: the Australian carers' payment runs to some AUD \$826.20 in monthly support plus an annual bonus paid to the most financially needy caregivers. *How Much Carer Payment You Can Get*, AUSTRALIAN GOV'T: DEP'T HUM. SERVS., <https://www.humanservices.gov.au/individuals/enablers/how-much-carer-payment-you-can-get> (last updated Mar 22, 2018).

119. See *What is Carer's Allowance?*, *supra* note 118.

120. *Id.*

121. Care Act 2014, c. 23, § 10(1) (UK).

122. *Id.* § 10(3), (11).

123. The Care and Support (Eligibility Criteria) Regulations 2015, SI 2015/313, art. 3, ¶ 1(a) (UK).

- (ii) providing care to other persons for whom the carer provides care;
- (iii) maintaining a habitable home environment in the carer's home (whether or not this is also the home of the adult needing care);
- (iv) managing and maintaining nutrition;
- (v) developing and maintaining family or other personal relationships;
- (vi) engaging in work, training, education or volunteering;
- (vii) making use of necessary facilities or services in the local community, including recreational facilities or services; and
- (viii) engaging in recreational activities.<sup>124</sup>

It is also required that the deterioration or inability results, or is likely to result, in “a significant impact on the caregiver’s well-being.”<sup>125</sup>

If an authority determines a caregiver is eligible for support, it will negotiate a support plan with the caregiver and the person cared for.<sup>126</sup> These plans “might include help with housework, buying a laptop to keep in touch with family and friends, or becoming a member of a gym so that the carer can look after their own health.”<sup>127</sup> The support plan might also include providing replacement care to allow the caregiver to take a break, so long as the care recipient agrees.<sup>128</sup> If paying for such support reduces the caregiver’s financial resources below a given minimum, then the support is provided for free.<sup>129</sup> The local authority can decide to assess a caregiver’s financial situation to see whether, and how much, he or she can afford to pay.<sup>130</sup> Deferred payment agreements can be reached, though the local authority may charge interest.<sup>131</sup> Where support is provided in the form of replacement care, the local authority—should it decide to explore the possibility of charging for such care—must assess the financial situation of the person cared for rather than the caregiver.<sup>132</sup> “[I]f replacement care . . . is charged for ‘then it would be the adult needing care that would pay, not the carer, because they are the

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124. *Id.* art. 3, ¶ 2.

125. *Id.* art. 3, ¶ 1 (c).

126. Care Act 2014, c. 23, §§ 24(1)(a), 25.

127. *Care Act Factsheets*, GOV.UK, <https://www.gov.uk/government/publications/care-act-2014-part-1-factsheets/care-act-factsheets> (last updated Apr. 19, 2016).

128. Care Act 2014, c. 23, § 20(1)(c), (6).

129. *Id.* § 20(2).

130. *Id.* § 17(3).

131. *Id.* §§ 34–35.

132. *Id.* § 17(4).

direct recipient of the service.”<sup>133</sup> In addition, caregivers have a right to request that the local authority meets some or all of their needs by money transfer in lieu of providing goods and services directly.<sup>134</sup>

Unfortunately, while U.K. caregiver support may be impressive on paper, Parliament is failing to follow up the improved caregiver rights framework in the Care Act 2014 with appropriate funding. According to Careers UK:

Between 2009 and 2013 spending on social care for older people fell by 15% in real terms and 250,000 fewer older people received publicly funded community services (a 26% fall). The problems of social care are not therefore caused by the rise in the number of older people but by Government spending cuts. The consequent hardships in terms of income poverty, poor health and isolation borne by carers are severe . . . .

. . . Ever since the implementation of the 1993 community care reforms there has been a steady increase in the numbers of carers—reflecting what is best described as the “neglect of social care.” Between 1992 and 2001 for example, there was a 28% reduction in the number of households receiving social care services. The research evidence establishes that this trend continues: the last 15 years have seen “increasing care burdens for the family, friends and neighbours” (particularly of older people) accompanied by greater financial burdens for carers. There has been an 11% increase in the number of carers from 2001 to 2011.<sup>135</sup>

In Israel, as mentioned above, legislative policy is based on the view that family members are naturally obliged to care for their elderly relatives for free.<sup>136</sup> The state provides long-term care benefits under the National Insurance Act that can be used to pay a personal caregiver, so long as he or she is not a family member of the care recipient.<sup>137</sup> The Act makes available, however, an indirect route for long-term care benefits to reach a family

133. CLEMENTS, *supra* note 42, at 32 (quoting *Care and Support Statutory Guidance*, GOV.UK, <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance> (last updated Feb. 12, 2018)).

134. Care Act 2014, c. 23, § 31. For a discussion of caregivers’ rights under English law before the Care Act 2014, see THE LAW COMM’N, ADULT SOCIAL CARE 39–51 (2010), [http://www.lawcom.gov.uk/app/uploads/2015/03/cp192\\_Adult\\_Social\\_Care\\_consultation.pdf](http://www.lawcom.gov.uk/app/uploads/2015/03/cp192_Adult_Social_Care_consultation.pdf). For an empirical examination of caregiver support in the U.K. between 2011–2013, see Jenni Brooks et al., *Personalisation, Personal Budgets and Family Carers: Whose Assessment? Whose Budget?*, 17 J. SOC. WORK 147, 151–60 (2017).

135. CLEMENTS, *supra* note 42, at 6 (internal footnotes omitted) (quoting DEP’T OF HEALTH, COMMUNITY CARE STATISTICS 2001: HOME CARE SERVICES FOR ADULTS (2002)).

136. BRODSKY ET AL., *supra* note 67, at 49.

137. The payment of such benefits to recipients of family care is specifically banned in the National Insurance Law (Temporary Provisions), 5773–2013, SH No. 2407 p. 225 (Isr.), which defines “carer” as, inter alia, “not a relative of the person entitled to the longterm care benefit.”

caregiver, applicable only where non-family care is unavailable. Where non-family long-term care has not been supplied to a person within 60 days of becoming eligible, or no such care is available, the benefit will be paid to that person in cash, so long as that person is living with a family caregiver.<sup>138</sup> In these cases, the benefit paid may reach the caregiver. When paid in cash, the benefit is currently worth between 978 NIS (approximately \$277 USD) and 4,412 NIS (approximately \$1,248 USD) a month, depending on the care recipient's circumstances.<sup>139</sup>

Serving as a family caregiver may also facilitate entitlement to other Israeli welfare benefits. Many low-income Israelis are eligible for benefits under the Israeli Income Security Act.<sup>140</sup> Eligibility is generally conditional on a person being an Israeli resident earning a monthly wage of 2,955 NIS or less (the average national monthly wage being 9,543 NIS), who has been determined by the public Placement Service to be unable to work for a living, or whom the Service has failed to place at a suitable job.<sup>141</sup> However, persons who have spent at least 45 days caring for a co-resident sick parent in need of constant supervision are eligible for these types of benefits under the Act even absent the aforementioned determination or failure by the Service.<sup>142</sup>

The most recent attempt in the United States to create a federal public benefit program for family caregivers was enacted as part of the Affordable Care Act ("ACA")<sup>143</sup> and established the Community Living Assistance Services and Supports ("CLASS").<sup>144</sup> This program would have paid caregivers, including family members<sup>145</sup> with no formal training in caregiving, to assist older Americans who wanted to stay in their own home rather than access long-term care in institutional settings.<sup>146</sup> Because of a general antipathy to government benefit programs, the enacting legislation made the CLASS program an optional proposition, and potential beneficiaries could choose whether or not to enroll—unlike traditional social insurance programs, like Social Security and Medicare, where enrollment is

138. National Insurance Act [Consolidated Version], 5755-1995, SH No. 1522 p. 257-58 (1995) (Isr.).

139. *Long-Term Care Benefit for Persons Employing a Live-in Caregiver: Benefit Value*, NAT'L INS. INST. OF ISR., [https://www.btl.gov.il/benefits/Long\\_Term\\_Care/siudBekesef/Pages/afsaroyot.aspx](https://www.btl.gov.il/benefits/Long_Term_Care/siudBekesef/Pages/afsaroyot.aspx) (last visited Apr. 5, 2018).

140. Income Security Act, 5740-1980, SH No. 991 (as amended) (Isr.).

141. *Id.* at 30.

142. Income Security Regulations, 5742-1982, KT 4316 p. 590 (Isr.).

143. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

144. *Id.* at 828-47 (codified at 42 U.S.C. §§ 300ll to 300ll-9), *repealed by American Taxpayer Relief Act of 2012*, Pub. L. No. 112-240, § 642(a), 126 Stat. 2313, 2358.

145. *Id.* at 841.

146. *Id.* at 828-42. *See generally* Richard L. Kaplan, *Financing Long-Term Care After Health Care Reform*, J. RETIREMENT PLAN., July-Aug. 2010, at 7 (discussing the features of the CLASS entitlement program for future retirees).

mandatory.<sup>147</sup> As a further concession to opponents of government “entitlement” programs, the ACA required the CLASS program to be fully self-supporting without requiring financing from general tax revenues.<sup>148</sup> The combination of voluntary enrollment (with its attendant problem of adverse selection) and the self-financing mandate made the CLASS program unsustainable<sup>149</sup> and it was repealed in early 2013.<sup>150</sup>

A different but still publicly financed mechanism to compensate family caregivers would be to “deem” Social Security wage credits for the services they provide. These caregivers could thereby receive enhanced Social Security benefits when they retired, avoiding one of the financial detriments that family caregivers face presently, as noted previously in this Article.<sup>151</sup> Again, this approach is not completely theoretical as such a plan was proposed as early as 2002<sup>152</sup> for caregivers who provided at least 80 hours of care per month.<sup>153</sup> To determine the applicable wage base from which retirement benefits are derived, that proposal used half of the average monthly wages earned by U.S. workers,<sup>154</sup> but other amounts could certainly be used instead. Finally, this proposal limited the number of credits that could be earned from family caregiving to 60 months,<sup>155</sup> which effectively required that the family caregiver would still need non-caregiver employment to receive Social Security retirement benefits. No other occupation requires its employees to earn Social Security credits from other sources, so it is not clear why this limit should exist beyond some unstated discomfort with the notion of receiving credits for informal caregiving services generally. In any case, the previously referenced Associated Press survey found that providing such Social Security credits for family caregivers was supported by 73% of respondents, including 70% of self-identified Republicans.<sup>156</sup>

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147. See Richard L. Kaplan, *Analyzing the Impact of the New Health Care Reform Legislation on Older Americans*, 18 ELDER L.J. 213, 231 (2011). Program enrollment becomes effective when the related taxes are imposed on wages or self-employment income. See I.R.C. § 3101(a) (Social Security tax on wages); *id.* § 3101(b)(1) (Medicare tax on wages); *id.* § 1401(a) (Social Security tax on self-employment income); *id.* § 1401(b)(1) (Medicare tax on self-employment income).

148. Patient Protection and Affordable Care Act, § 3208, 124 Stat. at 845.

149. See Letter from Kathleen G. Sebelius, Sec’y, Dep’t of Health & Human Servs., to Speaker of the House (Oct. 14, 2011), <http://www.ltccconsultants.com/articles/2011/class-dismissed/Sebelius-CLASS-Letter.pdf>.

150. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 642(a), 126 Stat. 2313, 2358.

151. See *supra* text accompanying notes 46–55.

152. Social Security Caregiver Credit Act of 2002, H.R. 4743, 107th Cong. (2002). Similar legislation has been introduced in every subsequent Congress, the most recent iteration being S. 2721, 114th Cong. (2016).

153. H.R. 4743 § 2(a) (proposing to add 42 U.S.C. § 235(a)(1)).

154. *Id.* § 2(a) (proposing to add 42 U.S.C. § 235(b)(1)(A)(i)).

155. *Id.* § 2(a) (proposing to add 42 U.S.C. § 235(b)(1)(B)).

156. AP SURVEY, *supra* note 37, at 11; see also Poll: Women Age 50+ Want Social Security Beefed Up Now, AARP BULLETIN, Sept. 2016, at 4, 4 (reporting that “2 out of 3 women believe that Social

*B. SECOND MECHANISM: TAX INCENTIVES*

While public financing of family caregivers might be the most direct policy response, the significant antipathy toward new “entitlement” programs (at least in the United States) suggests that a more acceptable pathway for many lawmakers might combine public and private financing through income tax incentives for persons who pay caregivers. Such tax incentives could partially offset the financial burden of paying family caregivers and might therefore encourage more families to compensate them.

One such tax incentive is the present deduction of medical expenses.<sup>157</sup> This deduction can apply to payments made to family caregivers, but only if those family members are licensed professionals for the services they provide.<sup>158</sup> Even if that particular restriction were eliminated, certain structural limitations pertaining to this deduction significantly diminish its potential for facilitating the compensation of family caregivers.<sup>159</sup> Those limitations are beyond the scope of this Article, but the bottom line is that more caregiver-specific provisions would be helpful.

Once again, the possibility of providing persons paying family caregivers with a tax incentive is not purely theoretical. Over the past decade and a half, various proposals have been made to provide tax credits for amounts paid to caregivers who live in the same residence as the care recipient.<sup>160</sup> These proposals provided tax credits, which reduce a person’s tax burden dollar for dollar, rather than tax deductions, which lower a person’s taxable income and therefore vary in their impact depending on the claiming taxpayer’s marginal tax bracket. Tax credits bestow a more consistent benefit to taxpayers because their value is known in advance and does not depend on other tax variables. Some of the proposals stipulated a specific amount for the tax credit, regardless of actual expenditures made by the care recipient, while other proposals based the tax credits on actual expenditures for care, typically subject to an overall cap or other limitation.<sup>161</sup> Thus far, none of these proposals have been enacted in the United States, even though the previously referenced Associated Press survey found that 83% of respondents favored such incentives, including 86% of those age 40 to 64 years old.<sup>162</sup>

Israel created caregiver-specific tax incentives in a pensions context. Israeli provident funds—one of several forms of pension fund available under

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Security should be changed to create a credit for people who take time off from work for caregiving responsibilities”).

157. I.R.C. § 213 (2012).

158. *Id.* § 213(d)(11)(A).

159. See Richard L. Kaplan, *Federal Tax Policy and Family-Provided Care for Older Adults*, 25 VA. TAX REV. 509, 543–51 (2005).

160. See, e.g., H.R. 4946, 107th Cong. § 3 (2002); S. 1031, 108th Cong. § 1 (2003); H.R. 5110, 108th Cong. § 3 (2004); H.R. 2682, 109th Cong. § 3 (2005).

161. See, e.g., H.R. 4708, 114th Cong. § 2 (2016); S. 2759, 114th Cong. § 2 (2016).

162. AP SURVEY, *supra* note 37, at 11.

Israeli law—will reimburse their members, by distributing the money a member has accumulated in the fund to that member, to cover medical (but not dental) expenses members' relatives incur, when those expenses exceed half the combined annual income of the member, their partner, the relative who incurs the expenses, and that relative's partner. Such reimbursement is tax-exempt whether the member is over or under the age of 60, the age at which eligibility for tax-exempt distributions normally commences.<sup>163</sup> Provident funds may also distribute monies a member has accumulated to that member, with the distribution exempt from income tax regardless of the member's age, when a relative of the member has become severely disabled.<sup>164</sup> The U.K., which provides family caregivers with limited welfare benefits, has not created caregiver-specific tax incentives.<sup>165</sup>

### C. THIRD MECHANISM: FAMILY CAREGIVER AGREEMENTS

An approach to compensating family caregivers that can be implemented without requiring any governmental intervention would recognize the efforts of these caregivers with a formal employment contract called a family caregiver agreement. Such agreements currently exist in the United States, but their presence is largely limited to situations in which a family anticipates that it may eventually seek governmental assistance under the Medicaid program for nursing home expenses.<sup>166</sup> The national median cost of a semi-private room in such a facility was \$82,125 per year with substantial variation across the United States, according to the latest survey of such costs.<sup>167</sup> Medicaid pays for such expenses, but it is a means-tested welfare program with strict eligibility criteria that limit how much monthly income and assets a person can have and still qualify for benefits.<sup>168</sup> The specific parameters vary

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163. Income Tax Regulations (Rules for Approving and Administering Provident Funds), 5724-1964, KT 1583 p. 1302, 1309-10 (Isr.).

164. *Id.* at 1310.

165. *Care/Work: Law Reform to Support Family Caregivers to Balance Paid Work and Unpaid Caregiving* 83 (B.C. Law Inst. & Canadian Ctr. for Elder Law, Study Paper No. 4, 2010), <http://dx.doi.org/10.2139/ssrn.1655022> (“The U.K. supports its family caregivers directly through its social security program and has not created a caregiver specific tax incentive.”). As for Israel, persons who pay for the institutionalization of a partner or parent who is completely paralyzed, permanently bedridden, blind or insane, receive a credit equal to 35% of the excess of that payment over 12.5% of their taxable income. Income Tax Ordinance, 5721-1961, SH No. 6 p. 131 (Isr.). Tax incentives for family caregivers are more prominent in Canada, where they exist at both the federal and the provincial levels. See *Care/Work: Law Reform to Support Family Caregivers to Balance Paid Work and Unpaid Caregiving*, *supra*.

166. See Kaplan, *supra* note 159, at 530-34.

167. See GENWORTH, SUMMARY OF 2016 SURVEY FINDINGS 2 (2016), [https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/131168\\_050516.pdf](https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/131168_050516.pdf) (providing a \$225 median daily room rate; \$225 daily rate × 365 days = \$82,125).

168. See FROLIK & KAPLAN, *supra* note 50, at 114-26.



among the individual states, because state governments contribute as much as one-half of the cost of the Medicaid program.<sup>169</sup>

But the federal government also imposes eligibility restrictions and levies significant penalties on would-be applicants who transfer funds gratuitously to qualify for the program's benefits. In brief, any uncompensated transfer made during the 60 months prior to applying for Medicaid benefits<sup>170</sup> triggers a "period of ineligibility" that is determined by dividing the amount of such transfer by a monthly cost factor determined by the particular state.<sup>171</sup> Medicaid benefits are then denied for the length of that period.<sup>172</sup> Payments made pursuant to a family caregiver agreement, however, are treated as compensated transfers because the care recipient received services for the amount transferred and therefore do not trigger ineligibility penalties.<sup>173</sup> To achieve this result, these payments must relate to services that were actually rendered and documented, and the family caregiver agreement must precede the provision of such services.<sup>174</sup>

Beyond the specific Medicaid context, family caregiver agreements can provide substantial benefits. Paying a family caregiver as services are performed is less likely to spawn challenges from family members who are *not* providing such services than a testamentary provision provided many years after such services are performed. This contemporaneous recognition of the family caregiver's entitlement to payment also allows any dissenting family members to seek documentation at a time when such records are more likely to be available or can be more easily reconstructed. Moreover, if dissenting family members really believe that the payment is inappropriate, they can step up and take over some of the caregiving responsibilities at a time when those responsibilities still exist. These agreements, in other words, mitigate against otherwise surprise, or unknown, aspects of a testamentary provision that often precipitate will challenges.

In addition, when property is transferred, the family caregiver agreement can limit how much of the property's value is taxable to the person who received that property. In *Dieter*, where the transfer of a house in exchange for caregiving services was challenged, the absence of any caregiver agreement left the reviewing court no basis for isolating the compensation element of this transfer from the gratuitous element.<sup>175</sup> Accordingly, the

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169. *Id.* at 111.

170. 42 U.S.C. § 1396p(c)(1)(B)(i) (2012).

171. *Id.* § 1396p(c)(1)(E)(i).

172. *Id.* § 1396p(c)(1)(A).

173. See THOMAS D. BEGLEY, JR. & JO-ANNE HERINA JEFFREYS, REPRESENTING THE ELDERLY CLIENT: LAW AND PRACTICE § 8.05[B][6] (1999); ERIC M. CARLSON, 1 LONG-TERM CARE ADVOCACY § 7.12[5][b][ii] (Matthew Bender ed., 2017).

174. See CTRS. FOR MEDICARE & MEDICAID SERVS., STATE MEDICAID MANUAL § 3258.1 (2004).

175. *United States v. Dieter*, No. Civ. 01-1435(DWF/AJB), 2003 WL 1903395, at \*1, \*9-10 (D. Minn. Apr. 11, 2003).

entire home's value was deemed taxable even though some portion was undoubtedly intended as a tax-free bequest.<sup>176</sup> Family caregiver agreements can therefore limit the compensatory component of a property transfer.

Furthermore, a family caregiver agreement can set forth in advance what is expected from both parties.<sup>177</sup> In effect, such an agreement treats the family caregiver with the same respect as a non-family caregiver on such important matters as the caregiver's responsibilities and benefits, rates of pay, holidays and vacations, and possibly even health insurance. The rate of pay can be tied to what comparable services from home health care agencies would cost in the specific geographic vicinity of the care recipient's residence, as U.S. legislation authorizes for family caregivers of veterans.<sup>178</sup> The agreement could cover some common future contingencies pertaining to the care recipient, such as what happens if (or when) that person's needs increase, that person requires special equipment or outside services, or that person transitions to institutional care. The agreement can also cover some possibilities that pertain to the family caregiver, such as allocating responsibility for arranging substitute care when that person becomes ill or disabled or marries, relocates, or dies.

To be sure, a family caregiver agreement makes it abundantly clear that the services provided by the caregiver represent an economic exchange and that the caregiver accordingly has taxable income from compensation for these services.<sup>179</sup> Many people will avoid using such agreements for this reason alone. But those who prefer the possibility of a tax-free inheritance may be improperly discounting the possibility of losing the bequest to familial quarrels, to say nothing of a tax audit that recharacterizes the inheritance as compensation, at least in part. In other words, the lack of a family caregiver agreement does not preclude the U.S. Internal Revenue Service ("IRS") from challenging the characterization of a bequest as disguised compensation—though it certainly makes the tax authority's burden of proof more difficult. It was in that context that the authors of a practitioner-oriented column in a prominent U.S. tax journal advised that wills should not reference a legatee's past caregiving services, asking: "Which will be the greater danger—the disgruntled sibling or the IRS?"<sup>180</sup> It should be noted, however, that if a sibling invalidates the will, the loss to the caregiver might be as much as 100%, while

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176. See *id.* at \*9.

177. For an excellent guide to what such agreements should include, see generally Kerry R. Peck, *Creating Effective Agreements for Payment of Family Caregivers*, 37 BIFOCAL, Jan.–Feb. 2016, at 63 (2016); see also Charles P. Sabatino, *Into the Matrix of Law and Caregiving*, GENERATIONS, Winter 2015–16, at 80, 87.

178. 38 U.S.C. § 1720G(a)(3)(C)(ii) (2012).

179. See I.R.C. § 61(a)(1) (2012).

180. Burgess J.W. Raby & William L. Raby, *Sentiment or Greed: Gift or Compensation?*, 95 TAX NOTES 1045, 1048 (2002).

the most the IRS could claim would be the applicable tax rate—no more than 37%, presently.<sup>181</sup>

In any case, the explicit compensation authorized by a family caregiver agreement can provide some of the offsetting retirement-oriented benefits noted earlier in this Article.<sup>182</sup> Those benefits include earning additional “quarters of coverage” to qualify for benefits under the Social Security and Medicare programs, receiving higher retirement benefits under Social Security because of higher credited earnings, and being able to contribute to self-directed retirement savings plans.

#### D. ADDITIONAL MECHANISMS

Legislation, case law, and scholarship outside the United States feature additional mechanisms for providing compensation to family caregivers. In fact, one scholar has outlined several doctrinal mechanisms caregivers can use to extract compensation after the care recipient’s death by claiming against that person’s estate. These include proprietary estoppel,<sup>183</sup> constructive trusts,<sup>184</sup> unjust enrichment,<sup>185</sup> family provision on estate distribution,<sup>186</sup> and property adjustment on breakdown of the caring relationship.<sup>187</sup> This last suggestion is modeled on existing legislation in several Australian jurisdictions,<sup>188</sup> which entitles parties to “domestic relationships” (including non-conjugal “close personal relationship[s]’ . . . involv[ing] ‘domestic support’ and ‘personal care’”) to apply for “financial adjustment” on relationship breakdown (including “the adjustment of proprietary interests and [sic] exceptionally maintenance”).<sup>189</sup> As for family provision on estate distribution, Mika Oldham of Cambridge University suggests:

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181. See I.R.C. § 1.

182. See *supra* text accompanying notes 48–55.

183. See SLOAN, *supra* note 44, at 30–81, 84–90 (explaining “the extent to which the law does and could provide a remedy for an informal carer in circumstances where the care recipient has made some indication that the carer will receive a benefit in return for his caring efforts.”).

184. *Id.* at 81–90.

185. *Id.* at 121–35.

186. Inheritance (Provision for Family and Dependants) Act 1975, c. 63 (Eng. & Wales); SLOAN, *supra* note 44, at 136–205. An Israeli court made an award analogous to family provision on the English model to the daughter of an elderly couple who cared for her parents for years while living in their apartment, remaining jobless, single and nearing old age herself at their death. FC 1820-11-11 (Hi) R.G.A. et al. v. Y.A. et al., PM 1, 14 (2015) (Isr.). The court denied her claims to rights in the parents’ apartment but granted her an *ex gratia* payment worth about 10% of the apartment’s value. *Id.* at 8, 14. The payment was to be deducted from her siblings’ shares in that value. *Id.* at 14.

187. See SLOAN, *supra* note 44, at 206–16.

188. *Relationships Amendment (Caring Relationships) Act 2009* (Vic) (Austl.); *Relationships Act 2003* (Tas.) (Austl.); *Property (Relationships) Act 1984* (NSW) (Austl.).

189. SLOAN, *supra* note 44, at 212 (footnotes omitted) (quoting *Property (Relationships) Act 1984* (NSW) s 5(1), pt 3 (Austl.)).

a system of “successional priority,” which would give a person who takes care of a relative a prioritised right of provision from that relative’s estate . . . . [S]uch a “priority” concept could be combined with equity release and a state-sponsored loan system to provide a more instantaneous incentive for an informal carer.<sup>190</sup>

Another potential mechanism—applicable in the not uncommon case of a care recipient promising to bequeath property to a caregiver but passing away without doing so—is exemplified by the New Zealand Law Reform (Testamentary Promises) Act 1949. This Act gives the caregiver an enforceable statutory basis for a claim, based on the promise, in the administration of the promisor’s estate.<sup>191</sup> Finally, Oldham suggests giving caregivers a restitutionary claim against the state.<sup>192</sup>

## V. CONCLUSION

As societies age, the demand increases for in-home caregiving services that might forestall—or even prevent—older persons having to leave their homes for medical reasons. The countries examined in this Article observe, for the most part, a sharp dichotomy between non-family and family caregivers. The former receives contemporaneous compensation, but testamentary transfers are generally discouraged as likely infected with undue influence over the testator. Family caregivers, by contrast, generally receive no contemporaneous compensation, but face fewer barriers in collecting testamentary transfers from those who were in their care. Some family caregivers receive regular governmental payments, but only under specified circumstances and in amounts limited by government policies and budgetary shortages. The United States authorizes the payment of public benefits to family caregivers only in very restricted situations. The U.K. provides modest sums on a broader scale. However, the U.K. Carer’s Allowance is so modest as to largely be a token recognition of caregivers’ sacrifice. On the other hand,

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190. *Id.* at 14 (citing Mika Oldham, *Financial Obligations Within the Family—Aspects of Intergenerational Maintenance and Succession in England and France*, 60 CAMBRIDGE L.J. 128, 173–77 (2001)). Along similar lines, Professors Thomas P. Gallanis and Josephine Gittler have devised a thoughtful amendment to the Uniform Probate Code in the United States that would authorize an elective share to a family caregiver who provided “substantial uncompensated care” to a decedent. Thomas P. Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 U. MICH. J.L. REFORM 761, 780–85 (2012). This provision would be analogous to a surviving spouse’s elective share but would be conditioned on the family caregiver’s provable actions on behalf of the care-receiving decedent rather than on status alone. *See id.*

191. Law Reform (Testamentary Promises) Act 1949, s. 3, subs. 1 (N.Z.).

192. Oldham, *supra* note 190, at 165. At least one U.S. state—Illinois—authorizes analogous claims for reimbursement against the estate of a “person with a disability” in amounts that “take into consideration the claimant’s lost employment opportunities, lost lifestyle opportunities, and emotional distress,” with minimum allowances that vary from \$45,000 to \$180,000, depending upon the decedent’s disability. 755 ILL. COMP. STAT. § 5/18-1.1 (2007). For this purpose, a “person with a disability” can be someone who “because of mental deterioration or physical incapacity is not fully able to manage his person or estate.” *Id.* § 5/11a-2(a).

Israel incentivizes the employment of non-family caregivers but will pay family caregivers indirectly when assistance from non-relatives is unavailable.

All three countries seem to rely on an expectation that many people will care for their relatives for free, or for minimal compensation. Care recipients, who use the U.S model of caregiver agreements, can pay their caregivers a salary only if they have the necessary means. Given today's extended lifespans and limited public tolerance for taxes, it may be that a publicly funded solution to family caregivers' plight is impossible. But, at least in the United States, there is no doubt that benefits for family caregivers need to be increased.